

BEFORE THE ARBITRATOR

In the Matter of the Arbitration  
of a Dispute Between

TWO RIVERS CITY EMPLOYEES LOCAL 76,  
AFSCME, AFL-CIO

and

CITY OF TWO RIVERS

Case 73  
No. 47762  
MA-7376

Appearances:

Mr. Gerald D. Ugland, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.  
Davis & Kuelthau, S.C., by Mr. Mark L. Olson, appearing on behalf of the City.

ARBITRATION AWARD

The Employer and Union above are parties to a 1992-94 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve the grievance of Wayne Ploor, concerning the Employer's insistence that he be placed on a medical leave of absence rather than allowed to work as Equipment Operator I while under medical restrictions.

The undersigned was appointed and held a hearing on June 8, 1993 in Two Rivers, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. A transcript was made, but the parties deferred the filing of briefs pending further negotiations in an attempt to resolve the matter. Following protracted negotiations, the parties were unsuccessful in settlement attempts, and briefs were filed by both. The Employer also submitted decisions rendered in a parallel Workers' Compensation proceeding, to receipt of which the Union has objected. The record was closed on March 11, 1996.

Issues:

The Union proposed the following:

1. Did the Employer violate the collective bargaining agreement by failing to re-employ Wayne Ploor as an Equipment Operator I?
2. If so, what is the remedy?

The Employer proposes the following:

Did the City of Two Rivers violate the terms of Article 3, Section B; Article 3, Section D; or Article 3, Section E of the 1992-1994 collective bargaining agreement when it placed Wayne Floor on an unpaid leave of absence in November, 1991, when he was unable to perform all of the duties of the Equipment Operator I position?

Relevant Contractual Provisions:

**ARTICLE III - MANAGEMENT RIGHTS**

The City possesses the sole right to operate City government and all management rights repose in it, but such rights must be exercised consistently with the other provisions of this contract. These rights include the following:

- A. To direct all operations of City government.
- B. To establish reasonable work rules, with the reasonableness of the rules to be subject to the grievance procedure.
- C. To hire, promote, transfer, assign and retain employees.
- D. To suspend, demote, discharge and take other disciplinary action against employees, for just cause.
- E. To relieve employees from their duties because of lack of work or for other legitimate reasons.
- F. To maintain efficiency of City government operations entrusted to it.
- G. To take whatever action is necessary to comply with State or Federal law.
- H. To introduce new or improved methods or facilities.
- I. To determine the number, structure and location of departments and divisions; and the kind and amounts of

services to be performed.

- J. To change existing methods or facilities.
- K. To determine the methods, means and personnel by which operations are to be conducted.
- L. To take whatever action is necessary to carry out the functions of the City in situations of emergency.
- M. To determine the schedule of work for employees in the bargaining unit.
- N. To contract out for goods and services; however, such contracting out shall not result in a reduction of the normal work hours nor be used to decrease, replace or displace bargaining unit employees.

...

#### **ARTICLE IX - GRIEVANCE PROCEDURE**

...

- C. Definition of Grievance: A grievance shall mean a dispute concerning the interpretation, application or enforcement of this contract.

...

- E. Arbitration:

...

- 5. Decision of Arbitration Board: The decision of the Arbitration Board shall be limited to the subject matter of the grievance. The Arbitration Board shall not modify, add to or delete from the express terms of the agreement.

Facts:

Grievant Wayne Ploor was hired by the City in 1969 into its Public Works Department. By 1987, he was classified as an Equipment Operator I. In April, 1991 Ploor had surgery, to correct the results of an injury received years earlier on the job. He returned to work in August of that year, and continued to work until November on work described by the City as light duty. At that time, the City declined to continue the grievant on light duty and placed him on an indefinite leave of absence. The dispute concerns whether the City had the right to refuse the grievant work in his regular classification from November 9, 1991 onwards.

Much of the evidence in the record is disputed. Furthermore, the passage of time due to settlement attempts and a parallel Workers' Compensation proceeding has added disputed material, in which the City alleges that documents produced in the course of the Workers' Compensation proceeding should be admitted here and the Union objects that they are irrelevant. Upon review of the approximately 250-page 1993 transcript in this proceeding, I am persuaded that not all the facts which the parties have sought to introduce are relevant. The extensive testimony and exhibits will be referred to here only as necessary for explanation.

Two job descriptions were introduced into evidence describing the position of Equipment Operator I. The first of these, introduced by the Union, dates from 1972, and states in pertinent part as follows:

#### NATURE OF WORK

This is manual and skilled work in construction, maintenance, and repair of streets, alleys, and thoroughfares and other public works facilities, regularly involving responsibility for safe and efficient operation of all types of automotive and power equipment including a backhoe, sweeper, front end loader, snow blower and snow loader. An employee performs limited laboring tasks required during maintenance work and normally using skills acquired on the job. The primary requirements for recruitment are general mechanical ability, sound physical condition, experience in related work activities, and proven ability to perform safely and efficiently with heavy automotive equipment.

#### ILLUSTRATIVE EXAMPLES OF WORK

Acts as leadworker to a small group of workers or relieves foreman during absences.

Repairs sidewalks, curbs, alleyways, culverts and driveways.

Operates compressor, bucket machine, sewer cleaning

equipment, and various pneumatic tools.

Operates a variety of medium to heavy automotive equipment not requiring specialized training on a regular or regular relief basis.

Loads rock and broken concrete; shovels, digs, and fills holes with hand shovels and other tools.

Repairs barricades, scrapes ice, snow, repairs catch basins, manholes, and cleans sewers.

Performs general semi-skilled laboring tasks in connection with the maintenance of a street or park and cemetery system.

Performs related work as required.

Operates rubber-tired front end loader in all types of maintenance activities. Also operates end loader in safe and efficient manner to remove snow from streets and other public areas.

Operates snow blower and snow loader to safely and efficiently remove snow from streets and other public areas.

#### KNOWLEDGES, ABILITIES AND SKILLS

Some knowledge of the common practices, methods, tools, and materials of varied, skilled maintenance and construction work.

Some knowledge of the hazards and safety precautions of the work.

Ability to understand, follow and in some instances give oral and written directions.

Ability to perform heavy manual labor for extended periods.

Ability to use hand and mechanical tools and equipment, and develop skill in assigned operations.

Ability to operate trucks, small tractors, sweeper, backhoe, snow blower or loader, and rubber-tired front end loader.

A later job description was introduced by the City, and the Union objected to receipt of this document because it was undated and the Union had not previously been given a copy. I find the testimony supporting the genuineness of this document to be sufficient to justify its admission into evidence. As best it can be determined, the job description quoted below dates from approximately 1991, and in pertinent part it largely repeats the previous job description:

## NATURE OF WORK

This is a manual skilled work in construction, maintenance and repair of public works facilities. The work involves responsibility for safe and efficient operation of all types of automotive and power equipment. An employee performs laboring tasks required during maintenance work using skills acquired on the job. This work involves participating in the supervising all types of public works maintenance. Such supervision is in the form of general advice and direction of a small group of employees. This position differs from Public Works Maintenance Man in that work is performed independently under general directions of the Public works Foreman. An employee of this classification should have general mechanical ability, sound physical condition, experience in related work activity and proven ability to perform safely and efficiently with heavy automotive equipment.

## ILLUSTRATIVE EXAMPLES OF WORK

Operates heavy automotive equipment:

This includes but is not limited to end loader, motor grader, mower tractor, street sweeper, backhoe and snowblower.

Operated power equipment:

This includes but is not limited to air compressor, concrete saw, air hammer and pumps.

Drives truck:

Hauls gravel, broken concrete and asphalt, and does other miscellaneous driving chores.

Acts as lead worker:

Directs a small crew of workers or jobs as directed by Public Works Foreman.

Does light and heavy construction work:

Including but not limited to carpentry and masonry work,

street repair and sewer repair.

## ATTACHMENT 1

Does maintenance work

Patches streets, cleans and repairs sewers, cleans and repairs catch basins, etc. Erects signs, barricades and snow fence.

Operates bridges:

Open and close bridges and does preventative maintenance work on bridges.

Performs daily equipment maintenance:

Cleans and greases equipment daily when used.

Performs work as required.

Performs such other duties as assigned by the Public Works Foreman or Public Works Director.

## KNOWLEDGES, ABILITIES AND SKILLS

Knowledge of the common practices, methods, tools and materials of varied, skilled maintenance and construction work.

Knowledge of the hazards and safety precautions of the work.

Ability to understand, follow and in some instances give oral and written directions.

Ability to perform heavy manual labor for extended periods.

Ability to use hand and mechanical tools and equipment, and develop skill in assigned operations.

Ability to operate trucks, small tractors, sweeper, backhoe,



snow blower or loader, and rubber-tired front end loader.

Mechanical aptitude.

The Union presented four witnesses, including the grievant, all of whom testified to the effect that the grievant had not been required to perform all of the duties of Equipment Operator I when he was the senior of two employes in that classification. The City presented testimony from the City Manager and two supervisors, who testified to the effect that the grievant continued to be, and was, regularly required to perform all functions of the Equipment Operator I position, including those which were primarily the source of the dispute. The more relevant aspects of this disputed testimony will be summarized here:

William Scola, Public Works Supervisor since 1985, testified that a number of work functions of both Equipment Operators required heavy manual labor as described in the job descriptions. Scola testified that at times, the Equipment Operator I's must engage in heavy lifting, including loading of concrete pipe, loading of PVC pipe and placement of that pipe in ditches with shoveling of sand and gravel; removal and replacement of manhole covers; working in sewers or raising and lowering pails of sand and gravel to and from other employes working underground; cleaning trucks, including work above shoulder height; transporting wheelbarrows filled with concrete; removing concrete including lifting chunks of concrete into the front bucket of a front end loader; lifting concrete catch basin covers and pumps; shoveling and raking blacktop hot mix off a truck; and raising and pounding a fence post pounder. Other similar examples of work requiring heavy manual labor were given both by Scola and by Michael Lewis, Director of Public Works. Both admitted that the senior of the two Equipment Operator I's drives the Department's street sweeper as the primary part of his duties during the spring and summer months, but both contended that street sweeping is not a City priority except for about two months in the spring, and they testified that the employe on the street sweeper is frequently and unpredictably called off the sweeper to help with road maintenance and other public works crew functions. Scola testified that during the August to November, 1991 period when he gave the grievant the assignments he considered to be light work and within the grievant's medical restrictions (discussed below), he received complaints from other employes that the grievant was not carrying his share of the work. Scola testified that this caused a morale problem, and that he could not rely on Ploor as a versatile member of the crew, which he and Lewis testified the City needs because of the small size of the Public Works Department and the varied nature of the jobs which must be performed. Steven Nenonen, City Manager, testified that he refused a request by Lewis that the grievant be considered terminated in June, 1992, at a time when Ploor apparently would be unable ever to return to work, because he considered it still possible that the grievant might recover, and because it was possible that a job would open up which was within the grievant's medical restrictions. Nenonen also testified, however, that he considered the limited duty given to the grievant from August to November of 1991 as make-work.

The grievant testified that he did very little heavy manual labor as a senior Equipment

Operator I. The grievant testified that the two Equipment Operator I positions were substantially different, and that the junior Operator (which position he filled from 1987 to the winter of 1990-91) had to perform significant amounts of manual labor of the kinds testified to by Scola, but that the senior Operator did not. Ploor testified that the senior Operator was primarily assigned to street sweeper driving during the summer and spring months, and that his winter work focused on repair of barricades and painting, as well as other work which is concededly within the restrictions placed on the grievant by his doctor in 1991. There is no dispute that driving the street sweeper was within the grievant's work restrictions. The grievant testified that the heaviest work he had performed while on standby duty as a member of the Public Works crew was to lift a manhole cover using a pick. The grievant testified that raising manhole covers (using tools) was within his restrictions.

The grievant testified, and presented a doctor's slip in confirmation, that during the relevant period of time he was restricted from lifting, pulling or pushing in excess of 40 pounds with his right arm below shoulder height, or in excess of 60 pounds with both arms. The grievant was further restricted from raising a weight of more than five pounds overhead. The grievant testified on cross-examination that he could shovel sand and gravel and could move manhole covers, could load tar into the kettle when the 60 to 80 pound boxes were split in half, could use a post pounder, handle chipping of branches and brush, and could handle rows of snow fence as one of the two-person team normally assigned that duty. The grievant admitted he could not handle an air hammer, could not shovel concrete, move castings, or sewer pipe, pumps, 80-pound cement bags, or the full boxes of tar. The grievant also admitted he could not hoist pails of sand and gravel, and could not close the tail gates on trucks unaided. The grievant testified that the air hammer had been essentially replaced by a Bobcat-mounted hydraulic concrete breaker; Scola testified that the air hammer is still sometimes in use and that a smaller air hammer is in use in the cemetery during the winter, when it is used to dig graves in the frozen ground and the Equipment Operator I may serve as air hammer operator from time to time. Late in the hearing, the grievant confirmed in testimony that he was the senior of the two Equipment Operators for a relatively short period, from about November, 1990 until he went for his surgery in April, 1991.

Employees Wayne Johnson and Tim Schramm, and retired Equipment Operator I Everett Schroder, testified essentially consistently with the grievant as to the work of the Equipment Operator. Schramm, however, admitted that he has seen an Equipment Operator I work on concrete, including lifting chunks into a bucket. Johnson admitted that he has seen the sweeper operator get pulled off the sweeper to do higher priority work, including manual labor. And Schroder testified that while he was the senior of the two operators he did some pipe lifting and sewer work, and may have done shoveling from one to two hours at a stretch. The Union presented consistent testimony to the effect that both Schroder and his predecessor as the senior of the two Equipment Operator I's, James Mahlik, had severe health problems but continued to work without objection from the Employer. Johnson testified that Mahlik had a bad back while he worked as the senior Operator I, but did not know if Mahlik ever claimed a medical restriction. Schroder testified that while he was employed as the senior of the two Equipment Operator I's, he

had a bad heart, and was considered for a period of time to be a candidate for a heart transplant. He also finished working for the City at a time when he was scheduled to have a knee replaced, and had been 90 percent blind in one eye since birth.

Nenonen testified to, and presented corroborating documents of, 15 Workers' Compensation claims filed by the grievant during his years of employment. The grievant did not dispute these numbers. Nenonen testified that this number of claims was exceptionally high for the City's employes, and that it raised the worry to the City's management that if the grievant worked under the restrictions which he held in 1991, further injury was possible. The City also introduced an exhibit demonstrating that one previous cause of injury to the grievant had been moving manhole covers. Nenonen testified that the grievant's medical progress following his April, 1991 surgery hit a "plateau", and that the restrictions noted above continued to exist on the date of the hearing.

The City introduced evidence to the effect that a set of City work rules had been promulgated previously, which referred to the availability of light duty assignments but restricted these to 30 days' duration. The Union witnesses denied ever receiving a copy of these rules, and it appears from Union Secretary Treasurer Schramm's testimony that the employes were given the policies and told to sign them, but that the Union refused the booklets and advised employes not to accept them either.

Wayne Johnson, the DPW clerk, testified that according to the time cards the senior Operator would spend 70 percent of his time on the sweeper, and two hours on bridge tending work each day in fishing season. Johnson also testified that almost all of the new pipe that the City now orders is of the lighter PVC variety. But under cross-examination, Johnson admitted that he continues to order concrete catch basins and adjusting rings, and that 60 to 70 manhole castings are ordered each year. Johnson admitted that either of the Equipment Operators could be on the crew to install them, and that when the sweeper operator was pulled off the sweeper, he would work side by side with the street maintenance crew.

#### The Union's Position

The Union's primary contention is that the grievant, even with the medical restrictions cited above, was capable of performing the real work of the position he held, which the Union defines as senior Equipment Operator I. The Union notes that at the hearing it stipulated that no contention was made that the Employer had an obligation to create light duty for the grievant on an indefinite basis.

The Union argues that the primary work task of the senior Operator I has been to operate the street sweeper during the season when there is no snow on the ground, and to operate other equipment when not operating the sweeper. The Union contends that testimony adduced by the Union's witnesses demonstrates that only on rare occasions would the senior Operator I do some lifting of small chunks of concrete. The Union contends that the grievant was capable of

performing these duties.

The Union argues that supervisor William Scola's testimony was not credible in his claim that 50 percent of the grievant's time would be spent doing heavy physical work, and that Scola admitted that the pattern of assigning the sweeper was based on seniority. The Union notes that Scola admitted that he did not know how much an air hammer has been used in the cemetery, and contends that the City's use of a 1986 incident where the grievant was injured after two days of raising manhole covers was improper, because there is no evidence that the grievant would spend two days lifting manhole covers as an Equipment Operator I. Similarly, the Union contends that the evidence with respect to heavy lifting of other materials is sparse and that the evidence shows that where a crew is working on road maintenance, the senior Equipment Operator I assigned to that crew will be operating machinery rather than performing heavy physical labor. The Union further contends that the grievant is capable of lifting on his left side, and that his left side is dominant because he is left handed. The Union notes that the two prior occupants of the grievant's position both had significant physical hardships, yet performed on the job.

The Union argues that the grievant was either disciplined or laid off, depending on how the matter is viewed, and that the Employer all but terminated him in June, 1992, even though he was capable of doing at least the street sweeping and the action taken was during the street sweeping season. The Union argues that the job descriptions are archaic and do not distinguish sufficiently between the junior and the senior Operator I, and that in consequence the testimony should be relied on in preference to the job descriptions. The Union requests that the grievance be sustained and that the grievant be made whole for lost wages and fringe benefits during the relevant period. The Union notes in conclusion that the grievant received a revised doctor opinion of his physical condition in August of 1993, and thereafter returned to his former position. The grievant requests that the remedy be limited to back wages and fringe benefits to the point of grievance filing.

#### The Employer's Position

The City contends that the Union has failed to cite any provision of the collective bargaining agreement which could have been violated by the City's action. The City contends that the grievance alleges violation of three management rights expressed in Article 3 of the collective bargaining agreement: the right to establish reasonable work rules, with the reasonableness of the rules to be subject to the grievance procedure; the right to suspend, demote, discharge and take other disciplinary action against employees for just cause; and the right to remove employees from their duties because of lack of work or for other legitimate reasons. The City argues that none of these sections of the collective bargaining agreement contain any reference to the right of the City to determine whether or not an employe is medically fit for duty. The City contends that no work rule is implicated here, the grievant was never disciplined or discharged, and he was never laid off, which the City contends is the clear meaning of the language of paragraph E of Article 3. The City contends that there is no distinction in the collective bargaining agreement between the senior and junior Operator I, and a single job description has been used for that position throughout even

though the job description has changed over the years. The City contends that arbitrators have uniformly held that employers do not have to continue to employ persons who are not physically able to perform their jobs, and that heavy manual labor for an extended period of time was consistently required of the Equipment Operator I classification. The City argues that both City and Union witnesses testified that the grievant's work did in fact involve significant amounts of heavy manual labor, and that the grievant's disability prevented him from performing that work. The City notes that the grievant was on light duty for a considerable period of time, and argues that the City treated him fairly and that his inability to perform his normal duties created problems for the City.

The City also argues that the grievant's prior record of numerous alleged work injuries justified the City's reluctance to continue to employ him while partially disabled, and that the City was not under any obligation to provide him with continuing light duty. Finally, the City argues that a collateral forum has made certain determinations with respect to the City's obligation toward the grievant to provide work. The City requests that the grievance be denied.

#### Discussion:

Initially I must note that a number of documents offered by the Employer, both during and since the 1993 hearing, were objected to by the Union as irrelevant or prejudicial. I reserved ruling on these documents at the time, and have determined in the course of reviewing the transcript that Employer Exhibit 21, consisting of excerpts from the Personnel Policy manual, and Employer Exhibit 34, a notice of position opening containing an updated job description, should be and are admitted. These two documents were both credibly testified to as having been in use by the City for a significant period of time. The fact that the notice of position opening was not clearly dated does not make it irrelevant, and for that matter in a number of significant aspects it does not differ from the job description introduced by the Union. The excerpts from the personnel policy manual are relevant as a matter of consistency of policy of the City, whether or not the Union ever agreed to the policies therein contained.

The remaining documents consist of items which the Union objected to essentially because it had made a request for documents prior to the hearing and these were not included, or because they relate to a proceeding in a collateral forum which the Union contends should not properly be considered by the Arbitrator. I find that I need not rule on admission of these documents, because for reasons stated below, they would not change the outcome of this matter. Simply put, even without my considering this evidence offered by the Employer, the Union cannot prevail in this matter based on the record already adduced.

The fact that an arbitrator's jurisdiction under this collective bargaining agreement is restricted to disputes concerning "the interpretation, application or enforcement of this contract" does not mean that the Employer has the relatively unrestricted rights it claims. In particular, two principles apply here. One is that it is customary under management rights clauses such as Article 3 to assume an implied requirement of good faith and fair dealing, which among other

things restricts employers from arbitrary, capricious or discriminatory conduct in the exercise of such rights. In addition, I do not read Article 3, Section E as narrowly as the City would argue. To specify explicitly that employes may be "relieved from their duties because of lack of work or for other legitimate reasons" 1/ does not explicitly exclude from the "legitimate reasons" their fitness to perform the work based on their medical status. Indeed, "legitimate reasons" is apparently intended as a broad standard, which allows reasons for relieving an employe of his or her duties to be examined. Here, the Employer's reasons are medical. Whether that is "legitimate" or not is a factual question facially covered by the collective bargaining agreement and susceptible to testing in the usual manner of proof as with other factual questions.

Upon review of the record, I conclude that the City has met the implied burden to demonstrate legitimacy of its action. I note that though the testimony as to the functions likely to be performed by the grievant tends to differ along party lines, even the Union witnesses conceded that at times manual labor must be performed by that Operator I who is primarily occupied for some periods of the year in operating the street sweeper. There is no evidence that these occasions were predictable. The testimony that the grievant may have exerted greater physical effort in his temporary job as an over-the-road driver (particularly the use of anchor chains and heavy tarps) is immaterial to the propriety of the Employer's action, which was based on the grievant's own doctor's recommendations. And to the extent that a choice must be made in general between the testimony of the Union witnesses and that of the Employer witnesses as to the quantity of physical labor likely to be required of the grievant, I find the Employer witnesses at least as credible. There are conflicts and improbabilities in the testimony of each; I acknowledge that Scola's estimate that the sweeper operator would spend 50 percent of his time performing heavy manual labor appears excessive, but the Union witnesses also exhibited contradictions, in which statements that very little physical effort was exerted by this position in direct examination became considerably qualified under cross-examination. Thus even if I were to accept as a matter of principle that the grievant's position should be evaluated based on its actual content, rather than mixed with the other Equipment Operator's job duties as the job descriptions have done, I cannot read this record without concluding that the quantity of physical effort which must be expended by an Equipment Operator I when not on the street sweeper is significant and its scheduling somewhat unpredictable. The consequence is that the City has demonstrated that significant amounts of physical effort are integral to the position of Equipment Operator I, including that employe who is assigned to the street sweeper during some months of the year.

The legitimacy of the Employer's action is also affected by the likelihood of further injury. In this instance, I can only find that the likelihood was high. The grievant had approximately 15 prior Workers' Compensation claims, which credible testimony indicated was far in excess of other employes. He had become injured previously while doing heavy physical labor even when not working under restrictions. The likelihood of further injury occurring because he was in a

---

1/ Emphasis added.

somewhat disabled state could only have increased. I conclude that the City was entitled to take this into consideration in determining whether it was safe to return him to work. I further note that, whether or not the light work the City attempted to provide for the grievant was in all respects lighter than his Equipment Operator work, the City did make such an attempt, and bent its own rules in the grievant's favor in allowing this to continue for three months.

I note also that the grievant's testimony as to the content of his work may have been colored by the fact that the only period of the year during which he had actually held the job which he claimed as virtually a separate job classification was that period in which he could be expected to perform the least physical effort: November through April.

Meanwhile, there is no evidence here that the City's refusal to assign the grievant to work while he was disabled was an act of discipline. The just clause provision of the management rights clause therefore is not the applicable one. Nevertheless, the requirement of "legitimate reasons" in Section E of that Article provides a similar standard of review. The City has met that standard.

For the foregoing reasons, and based on the record as a whole, it is my decision and

AWARD

1. That the City did not violate the collective bargaining agreement by refusing to allow the grievant to work as an Equipment Operator I during his 1991-93 period of medical restriction.
2. That the grievance is denied.

Dated at Madison, Wisconsin this 21st day of May, 1996.

By \_\_\_\_\_  
Christopher Honeyman, Arbitrator